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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1052

CHESTER McKINNEY, Ind. and d/b/a
PARIS BOOKSTALL,
and the Magazine "Blast Off Number 1",
the Magazine "Beavers, Vol. 4, No. 1",
the Magazine "The Special No. 3"
The Magazine "The Special No. 4",
the Magazine "Sumpin Different",
and the Magazine "Pleasure Partners,
Volume 1, Number 1",

PETITIONERS,

versus

THE STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER BOTH THE TRIAL COURT AND THE HIGHEST STATE APPELLATE COURT CAN MAKE A DETERMINATION OF OBSCENITY VEL NON USING ONLY THE ROTH-MEMOIRS STANDARDS, UPON PRESENTATION OF THE MATERIAL ACCOMPANIED BY AFFIDAVITS, WHICH ALL ARE PART OF THE RECORD

ON REVIEW: AND WHERE THE PETITIONER DID NOT DENY THE OPEN AND WILLING SALE OF THE MATERIAL OR OFFER, OR ATTEMPT TO OFFER, ANY AFFIRMATIVE EVIDENCE AS TO THE OBSCENITY OR NON-OBSCENITY OF THE MATERIAL?

ARGUMENT

Petitioner spends considerable time in brief attempting to show that the standards to be utilized in the determination of obscenity extend beyond those tests propounded by this Honorable Court in *Roth v. U. S.* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1998 and carried forward and expanded upon in *Memoirs v. Massachusetts* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1. This test now commonly recognized as the *Roth-Memoirs* test is that material is obscene if: (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards; and (c) the material is utterly without redeeming social value.

The Alabama Supreme Court in this case (Appendix A) has demonstrated quite clearly that this Honorable Court has not extended the obscenity test to allow the commercial sale or distribution of obscene materials, so long as there is no pandering, sale to minors or invasion of privacy. This is shown by this Honorable Court's affirmances in *Milky Way Productions v. Leary* 305 F. Supp. 288 (S.D. N.Y. 1969) aff'd *New York Feed Company v. Leary* 397 U.S. 98, 90 S. Ct. 817, 25 L. Ed. 2d 78 (1970); *Gable v. Jenkins* 309 F. Supp. 998, *(N.D. Ga. 1969)*, aff'd 397, U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595, and in *U. S. v. Reidel,* 402 U.S. ....., 91 S. Ct. 1410, 28 L. Ed. 2d 813 where this Honorable Court

again renewed its adherence to *Roth* while continuing to limit its holding in *Stanley*.

Petitioner in brief has attempted to show that both the trial court and the Alabama Supreme Court should not be allowed to make a determination of obscenity because of the failure of the State of Alabama to present a *prima facie* case. This contention was argued extensively by Petitioner in briefs in the trial court and the Alabama Supreme Court and was met head-on by the Alabama Supreme Court and rightfully rejected.

Various State and Federal courts have met the issue of the sufficiency of the evidence in a determination of obscenity. The Fifth Circuit Court of Appeals in *Kahn v. U. S.* 300 F. 2d 78 (5CCA) Cert. den. 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 78 and the Illinois Supreme Court in *City of Chicago v. Kimmel* 201 NE 2d 382, to city only two courts, have held that the trier of fact is fully capable of determining whether material is obscene by applying the proper standards. The Fifth U. S. Circuit Court of Appeals in the *Kahn* case supra, the Alabama Court of Appeals in *Jones v. City of Birmingham* 45 Ala. App. 86, 224 So. 2d 922, Cert. den. 284 Ala. 731, 224 So. 2d 924, U.S. Cert. den. 396 U.S. 1011, and this honorable court in *Smith v. California* 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 have all held or inferred that the trier of fact is the embodiment of the community and is cognizant of the standards of the community relating to acceptance of obscenity.

Petitioner's contention has been refuted even stronger by courts that have held or inferred that introduction of the material presents a question for the judge and it is not necessary to call witnesses to testify or give expert opinions,

as to whether the material introduced is obscene based on contemporary community standards. Some of the decisions where state and federal courts have ruled on this point are as follows: *Kahn v. U. S.* supra; *U. S. v. Wild* 422 F 2d 34 (2 CCA); *U. S. v. Padell* 262 F 2d 357, Cert. den. 359 U. S. 942, 79 S. Ct. 723, 3 L. Ed. 2d 676; *Ginsburg v. U. S.* 383 U.S. 463, 86 S. Ct. 942 16 L. Ed. 2d 31; *U. S. v. Oakley* 290 F. 2d 517, Cert. den. 369 U. S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18; *Volanski v. U. S.* 246 F. 2d 842, 5 A.L.R. 3d at page 1191 S. 15(b); *Levin v. Maryland* 1 Md. App. 139, 228 A. 2d 487, Cert. den. 389 U. S. 1048, 88 S. Ct. 767.

A study of the record shows that the State of Alabama, in the trial court, introduced six magazines, supported by three affidavits per magazine, from citizens in different walks of life. One was an engineer, one an attorney, and one was a building contractor. All of these affidavits stated that the magazines were obscene. The State offered testimony showing nude men and women exposing themselves in lewd positions, implying sexual conduct. Petitioners, in this action, offered no affirmative evidence and neither party offered expert testimony. Petitioner made no offer to introduce any evidence.

Upon introduction of the State's evidence, the trial judge had before him more than adequate evidence to allow him to make a legal and constitutional determination of obscenity. As stated previously, when the magazines were introduced, a question for the judge arose and the existence or non-existence of witnesses or expert testimony has no bearing on the *ability* of the trial court to make a determination of obscenity based on contemporary community standards; *Kahn, Wild, Padell, Volanski, Levin* et. al cases supra.

The trial court and the Alabama Supreme Court had before them the magazines. The Alabama Supreme Court

spoke of these magazines, which were a part of the record, as silent witnesses and the fact that their open and willing sale was not denied enabled this highest Alabama Court to pass upon the obscenity, vel non, of the magazines. The Alabama Supreme Court not only affirmed the trial court's determination of obscenity but, also, went further and made an independent determination itself that the magazines were obscene.

A close examination of the six concerned magazines show them to be obscene *per se*. The magazine, "Sumpin Different," implies or suggests acts of fellatio; Pages 6, 14, 18; cunnilingus, Pages 4, 7, 11, 12, 24 sexual intercourse, Pages 3, 6, 8, 10, 14, 24, 25, 26, 27; buggery, Pages 5, 8, 22, 24. The remainder of the magazine in filled with pictures emphasizing the exposed genital areas of men and women with the type of clothes that only emphasize sex. The magazine, "The Special No. 3" has obsolutely no writing even to page numbers or publisher's name. It is generously supplied with pictures implying, or suggesting, sexual intercourse, buggery, fellatio, cunnilingus, lesbianism, and other sexually perversive acts. The magazine, "The Special No. 4" also has no writing or page numbers except the title and page after page implies acts of sexual intercourse, buggery, fellatio, cunnilingus and sexually perversive acts. The magazine, "Pleasure Partners" also has no page numbers and its pages are filled with implied or suggested acts of lesbianism, sadism, cunnilingus, sexual intercourse, fellatio and other acts of perversion. The magazine, "Blast Off" shows numerous implied acts of perversion and sexual intercourse sprinkled generously with pictures emphasizing by various methods the completely exposed genital areas of men and women in lewd and suggestive poses. The magazine, "Beavers" besides having numerous pictures of completely exposed men and

women in the previously mentioned lewd and sexually provocative positions also has a short story that is obscene to the extreme.

The previously described various acts of sexual perversion could only appeal to the prurient interest in sex. Certainly pictures suggesting or implying those various acts, which in many cases are in violation of Alabama law, completely affront contemporary community standards, and if there is any redeeming social value, I am at a loss to see it. The trial court, and the Alabama Supreme Court, obviously also found no redeeming social value.

Petitioner cites several cases where various magazines or books were held not to be obscene but as the Federal Courts have stated many times each publication must stand on its own. Those courts had other publications before them. They did not have these magazines. If this Honorable Court actually had before them the publications that were the subject of the cases cited by Petitioner then they might be able to make a comparison with the magazines at hand, but many words describing a picture will not necessarily depict the meaning of that picture to another. The word description of a picture is only the opinion of one person of what a picture portrays. This should in no way be binding on another publication with different pictures and poses. The Alabama Court of Appeals in *Jones v. City of Birmingham*, 45 Ala. App. 86, 224 So. 2d 922, Cert. den. 284 Ala. 731, 224 So. 2d 924, U. S. Cert. den. 396 U. S. 1011 stated that where evidence which is before the trial court does not come to the reviewing court the sufficiency of the evidence is not within the scope of appellate review. This holding could be used as an analogy to demonstrate that cases ruling on publications not readily available to this Honorable Court could not be

used as a "yardstick" in making a determination of obscenity on the respondent magazines in this case. One other point, I am sure this Court has noticed is that at least two of the magazines don't even have a publisher listed. Could it be that the publisher is afraid of being prosecuted?

CONCLUSION

The trial court decreed that the magazines were obscene. The Alabama Supreme Court, after examining the evidence, including the magazines, also made an independent determination that the magazines were obscene. It is respectfully submitted that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles H. Barnes, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17 day of March, 1972, the requisite number of copies of the foregoing Brief for Respondent in Opposition were mailed by first class mail, postage prepaid, to each of the following attorneys of record for the Petitioners in the case.

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APPENDIX A

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1971-72

Chester McKinney, Ind. and d/b/a Paris Bookstall
And the Magaizne, "Blast Off Number 1"
the Magazine "Beavers, Vol. 4, No. 1"
the Magazine "The Special No. 3"
the Magazine "The Special No. 4"
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the Magazine "Pleasure Partners, Volume 1, Number 1"

6 Div. 806 - 811

v.

STATE OF ALABAMA

Appeal from Jefferson Circuit Court, in Equity

PER CURIAM

Chester McKinney owned and operated an "Adults Only" book store on 5th Avenue, North, in Birmingham, Alabama. The windows of the store were painted so that the items offered for sale were not visible except to those who entered the store. It does not appear that there was any type of

promotion or advertising to stimulate the sales of the book store or any sales to minors.

On March 9, 1970, one D .H. Johnson, Chief Investigator for the Attorney General's Office of the State of Alabama, visited the book store as an investigator of pornography and purchased six magazines which were openly offered for sale. The magazines he purchased were sealed with cellophane covers so that they could not be picked up and thumbed through. The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spread-eagled apart, exposing her genital organs. On the basis of the sale and purchases of these magazines the Assistant Attorney General in the State of Alabama filed bills of complaint against each magazine in the equity side of the Circuit Court of Jefferson County praying that the magazines be adjudicated obscene and that a temporary injunction be issued against their further exhibition or sale in this State. Together with the bill of complaint was an affidavit from the Assistant Attorney General alleging that in his opinion the purchased magazines were obscene. The magazines themselves were attached as exhibits to the bills. The respondent demurred to the complaint raising constitutional questions and upon the demurrers being overruled he filed an answer denying that the magazines were constitutionally obscene and a cross-bill seeking an injunction restraining further interference with the operation of the business. The bills were filed pursuant to the provisions of Alabama Law on Obscenity which appears as Chapter 64 of Title 14 in the pocket part of the 1958 Recompiled Code of Alabama.

Paragraph 7 of each of the complaints charged as follows:

"7. Complainants represent unto your Honors that said magazine is obscene in that its dominant theme throughout appeals only to the prurient interest in sex, in that it is patently offensive because it affronts contemporary community standards relating to the representation of sexual matters and because said magazine is utterly without redeeming social value or importance; and, further, said magazine is obscene because it is or was, at the time of its possession by the respondents aforesaid, being pandered for the sole purpose of the commercial exploitation of sex. The sole function of said magazine is the presentation of photographs of nude persons in lewd and lascivious poses calculated to expose to unhampered view the genital organs of said persons and exhibited only to arouse the prurient interest of the reader in sex."

The cases were consolidated for trial.

Only one witness testified for the complainant. He merely testified to the purchase of the magazines in question from the book store and as to its location and the fact that it had the quotation "Adults Only" on the sign both inside and outside the store and as to the other facts set forth above.

The respondent called as his only witness the Assistant Attorney General who had instituted the proceedings. He was examined by the complainant as to his legal knowledge of the various opinions of the courts on the matter concerning the subject of obscenity. For what purpose this examination was conducted, we do not speculate.

No further evidence was offered by either party, thereupon the court entered the following decree:

"FINAL DECREE

"This cause came on to be heard and was submitted upon pleading and proof as noted on June 23, 1970.

"This cause was filed under Title 14, Section 374 (3) of the Code of Alabama of 1940 as recompiled and amended.

"The party Complainant is properly styled under the provisions of Chapter 64-A of said Title 14 and the party Respondents are properly named thereunder. The prayer for relief in the original Bill of Complaint prays for an adjudication by the Court that the magazine, the subject of this action, contains matter that is obscene, for a permanent injunction against the preparing, selling, exhibiting, commercially distributing, giving away or offering to give away or possessing it with the intent to sell and commercially distribute or exhibit or offer to give it away, and for its surrender, seizure and destruction.

"The Cross-Bill of the Respondent, Chester McKinney, prays for a ruling by the Court that the matter contained in the said magazine is not obscene, and further prays that the Court will enjoin the Complainant-Cross-Respondent from enforcing the said Statute upon which the Bill of Complaint is founded and from instituting any new civil or criminal proceedings against Respondent-Cross-Complainant.

"The Court must found its adjudication of obscenity, vel non, upon the prescribed definition contained in the said Section 374(3) as follows:

"'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." The Court finds that

the publication complained against comes within the definition of 'printed or written matter or material' as set forth in said subsection.

"Applying the above definition of the word 'obscene' to the printed or written material or matter complained against the Court finds that it is obscene. The Court gives weight and credence to the testimony of the witnesses for Complainant relative to the question of the obscenity of the said material; and, further, this Court has been, for the past 61 years a member of the society making up the community of Birmingham in Jefferson County, Alabama and, as such, is aware of the contemporary community standards, in said community, relative to the question of whether printed or written matter or material is obscene, within the meaning of the said Statute.

"The question of the obscenity, vel non, of the said magazine is the portal question in this cause, and having been by the Court decided it is CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

"ONE: That certain magazine or publication described in the Bill of Complaint as 'Blast Off Number 1' is declared to be 'obscene' within the meaning of the word as set forth in Title 14, Section 374(3) 1940, Code of Alabama as recompiled and amended.

"TWO: The said magazine is declared to be contraband.

"THREE: The Sheriff of Jefferson County is hereby ordered to seize and destroy all copies of the said magazine in the possession of the Respondent, Chester McKinney, individually and doing business as Paris Bookstall.

"FOUR: The respondents are permanently enjoined from preparing, selling, exhibiting or giving away, or offering

to give away or possession with the intent to sell, commercially distribute, exhibit, give away or offer to give away any copy of the said magazine.

"FIVE: The relief prayed by Respondent, Chester McKinney, individually and doing business as Paris Bookstall, is denied and the said Cross-Complaint is dismissed.

"SIX: The costs of this action are taxed to the Respondent, Chester McKinney, individually and doing business as Paris Bookstall, for which let execution issue.

"DONE and ORDERED this the 30th day of June, 1970.

"Wm. C. Barber
CIRCUIT JUDGE IN EQUITY SITTING"

Similar decrees were entered as to the other five magazines.

Amidst the sea of words and the shifting sands of legal writing as to what constitutes obscenity not subject to sale and distribution to adults one can well be led away from solid ground. The appellant refers again and again in his brief to the magazines as "girlie" magazines. A more apt description would be "genital" magazines. No claim is made or proof offered that they were of any artistic merit or other than lewd in general content or had any appeal other than prurient. Even a cursory examination reveals their wholly pornographic nature from which pollutants of the mind is all that could emanate.

We are not unaware that the burden of proof of obscenity was on the complainants and that the oral proof was scant but the silent witnesses, that is the magazines themselves, which are a part of the record under review and the fact that

their open and willing sale by the respondent is not denied suffices to enable us to pass upon the obscenity, vel non, of the magazines. From viewing them we are persuaded that in them we find a coalescence of the following elements:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

We find ourselves in full accord with the holding of the Supreme Court of Florida in the recent case of May v. Harper, 250 So. 2d 880, from which we quote:

"As their first point on appeal, appellants contend that by virtue of Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967), and the summary reversals based thereon, together with Stanley v. Georgia 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed 2d 542 (1969), they may engage in the commercial sale and distribution of obscene materials so long as there is no pandering, sale to minors, or an invasion of the privacy of others by their method of operation. Appellants are clearly in error. The United States Supreme Court's affirmances of Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288 (S.D. N.Y. 1969), aff'd New York Feed Co. v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L.Ed.2d 78 (1970), and Gable v. Jenkins, 309 F.Supp. 998 (N.D. Ga. 1969), aff'd 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed.2d 595 (both of which were decided subsequent to Redrup and Stanley), were affirmances of cases specifically holding that no additional tests for obscenity are required beyond the Roth-Memoirs standards. Shortly after appellants' brief was filed in this Court, the United States Supreme Court announced in United

States v. Reidel, 402 U.S. 91 S. Ct. 1410, 28 L. Ed.2d 813 (1971), that the Court was renewing its adherence to Roth and sharply limiting its prior holding in Stanley."

We therefore, affirm the decrees appealed from but in doing so observe and find that the obscenity, vel non, of the magazines in question offends not only the local morals of Jefferson County, Alabama, but are offensive both to contemporary standards in Jefferson County and across the country.

AFFIRMED.

Heflin, C.J., Coleman, Bloodworth, Maddox, and McCall, J.J., concur.